NO. 48877-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of: JOHN PHET, Petitioner.	RESPONSE OF THE INDETERMINATE SENTENCE REVIEW BOARD TO PERSONAL RESTRAINT PETITION AND MOTION TO DETERMINE REMEDIES

Respondent, the Indeterminate Sentence Review Board (ISRB or Board), responds to John Phet's personal restraint petition pursuant to RAP 16.9. Phet was originally sentenced in 2002 to life without the possibility of parole on five counts of aggravated first-degree murder and 100 months confinement on five counts of assault in the first degree, committed when he was 16 years of age. All ten counts are subject to firearm enhancements. On March 25, 2016, Phet was resentenced on the five counts of aggravated murder to a 25-year minimum term on each count. Phet argues he should be eligible for parole on the assault convictions, including firearm enhancements, after 20 years and that the imposition of a life-equivalent sentence violates the Eighth Amendment's Cruel and Unusual Punishment Clause. But RCW 9.94A730 only applies to an individual who was not sentenced for aggravated first degree murder.

Phet also raises a claim that firearm enhancements are not applicable to aggravated murder convictions and that his overall sentence violates the Eighth Amendment's Cruel Punishment Clause. Those claims do not involve the ISRB's administration of Phet's sentence and are better addressed by the prosecutor.

I. BASIS FOR CUSTODY

John Phet is in the custody of the Washington Department of Corrections and is currently incarcerated at the Stafford Creek Corrections Center pursuant to a valid judgment and sentence of the Pierce County Superior Court. He was convicted by jury verdict of aggravated first-degree murder (Counts 1 through five) and first-degree assault (Counts 6 through 10) each with a firearm enhancement. On June 28, 2002, the court (the Honorable Karen L. Strombom) sentenced him to consecutive terms of life imprisonment without the possibility of parole on Counts 1 through five and 100 months on Counts 6 through 10. Exhibit 1, Judgment and Sentence, *State v. Phet*, Pierce County Superior Court No. 98-1-03162-1, at 8 (Judgment and Sentence). The court also sentenced Phet to consecutive 60 months, flat time, on each of the 10 firearm enhancements. Exhibit 1, at 8.

Phet was eventually resentenced on the five aggravated murder counts on March 25, 2016, pursuant to Second Substitute Senate Bill

5064, §§ 9 and 11 (Laws of 2014, Chapter 130, §§ 9 and 11). *See* RCW 10.95.030(3); RCW 10.95.035. The superior court (the Honorable Stanley J. Rumbaugh) resentenced Phet to a minimum term of 25 years on each of the five aggravated murder convictions pursuant to RCW 10.95.030(3)(a)(ii). Exhibit 2, Judgment and Sentence Addendum Setting Minimum Terms, *State v. Phet*, Pierce County Superior Court No. 98-1-03162-1, at 3. All other terms in Phet's original judgment and sentence remained unchanged. Exhibit 2, at 4 (Section 3.2). Thus, Phet's sentence includes 5 terms of 25 years to life and 5 terms of 100 months confinement, all counts consecutive to each other, plus a 60 month firearm enhancement on all ten counts, also consecutive.

II. STATEMENT OF THE CASE

A. Facts of the Pierce County Crimes

On direct appeal, this Court summarized the facts of Phet's case as follows:

> On July 5, 1998, at approximately 1:45 a.m., several gunman burst into Tacoma's Trang DaiCafe and opened fire on the patrons, killing five people and wounding five others. Later, forensic officers collected 52 shell casings in and around the cafe.
>
> Tacoma Police Department (TPD) officers retrieved a neighboring business videotape recording of the alley behind the café. It revealed two vehicles backing into the alley minutes before gunfire erupted. Based on prior armed assault reports, TPD detectives recognized Chea's silver or

gray vehicle. They knew Chea as a member of the LOC's Out Crips (LOC's), a local gang. . . .

. . .

The detectives interviewed some of the surviving café patrons. . . . [O]ne of the people injured in the shooting, Son Kim, fought with Ri Le at the café. . . . The detectives focused their investigation on Le, Chea, and their associates. Later investigation revealed Phet's participation in the crimes.

. . .

The State charged Chea and Phet with five counts of first degree aggravated murder and five counts of first degree assault. The State alleged a firearm enhancement on each count.

The State sought a pretrial ruling on the admissibility of Chea's and Phet's involvement with the LOC gang. . . .

[U]ltimately Judge Strombom admitted the evidence of gang affiliation.

On August 3, 1999, while in custody, Chea and Phet assaulted Sok, who agreed to testify against Chea and Phet under his plea agreement. . . .

. . .

At trial, Sok who had been a member of the LOC's gang for a couple of years before the shooting testified. He said that on the evening of the shooting, he left home with his 9 millimeter handgun, which he carried to protect himself against other gangs' members.

. . .

> [O]n July 4, 1998, Chea called Chak and invited him over to Le's house. Chea wore red clothes. He drove his gray/silver Honda Civic and picked up Chak for the ride to Le's house. Phet and Mom were already there. . . . Eventually everybody got into cars and met other LOC's members.
>
> Chak . . . testified that Sok and his carload and Chea and his carload drove to the market. Chea told Chak to call the café to learn whether Kim remained there. When Kim answered, Chak hung up. Both cars then drove into the alley behind the café. . . . Chak also testified that Chea stayed in his car, and Sok and Ngeth stayed in Sok's car; everyone else got out and took guns from Chea's car trunk. Le told Khanh and Phet to guard the back door and to shoot if anyone came out. Leo, Le, Mom and Chak headed for the front door Chak opened the door and everyone rushed in and opened fire.
>
> . . .
>
> The jury found . . . Phet guilty as charged, including the firearm enhancements.

Exhibit 3, Opinion, *State v. Phet*, 127 Wn. App. 1016 (2005) (footnotes omitted).

B. The "*Miller* Fix": 2014 Amendment to RCW 10.95.030

In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court held for the first time that a mandatory sentence of life without the possibility of parole, as applied to an offender who was under the age of 18 at the time of his crime, violates the Eighth Amendment to the United States Constitution. Prior to *Miller*, the courts of this state had rejected similar challenges and upheld life-

without-parole sentences imposed on juvenile murder defendants. *See State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993); *see also Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996).

In response to the Supreme Court's decision in *Miller*, the Washington Legislature enacted 2SSB 5064 (Laws of 2014, ch. 130), often referred to as the "*Miller* fix." *See In re McNeil*, 181 Wn.2d 582, 586, 334 P.3d 548 (2014). Among other things, the *Miller* fix amended RCW 10.95.030 by establishing new sentencing guidelines for aggravated first-degree murder committed by juveniles and requiring sentencing courts to "take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller*." Laws of 2014, ch. 130, § 9(3)(b); RCW 10.95.030(3)(b). If the court does not impose a sentence of life without the possibility of parole or early release, the offender is given an indeterminate life sentence under the authority of the Board with a minimum term of at least 25 years, depending on the offender's precise age at the time of the crime. Laws of 2014, ch. 130, § 9(3)(a)(i) & (ii); RCW 10.95.030(a)(i) & (ii). The "*Miller* fix" also provides for Board review of juvenile offenders not convicted of aggravated first-degree murder whose prison sentences were in excess of 20 years. *See* Laws of 2014, ch. 130, § 10.

The *Miller* fix became effective on June 1, 2014. Laws of 2014, ch. 130, § 16. A juvenile offender who received a mandatory sentence of life without the possibility of early release prior to the effective date of the *Miller* fix is entitled to resentencing. For offenders such as Phet, when convicted of aggravated first degree murder committed when the person is at least sixteen years old, the minimum term of total confinement shall be twenty-five years. Laws of 2014, ch. 130, § 11(1); RCW 10.95.035(1); RCW 10.95.030(3)(a)(ii). As is the case with other juvenile offenders sentenced for aggravated first-degree murder, the offender's minimum term will be administered by the Board under RCW 10.95.030(3). *Id*; RCW 10.95.035(1).

The *Miller* fix also mandates that the juvenile offenders minimum term will be served as "flat time" and amended RCW 9.94A.540 regarding mandatory minimum terms. Laws of 2014, ch. 130, § 9(3)(c); RCW 10.95.030(3)(c).

C. Communications with the ISRB

On December 1, 2015, Phet's counsel emailed the ISRB asking, in general terms, if there was a policy regarding parole eligibility for Miller-fix minimum terms that are ordered to run consecutive. *See* Petition, at Attachment. The Board stated it will accept petitions for a hearing after the offender serves 20 years of flat time. *See* Petition, at Attachment. On

this same date, Phet's counsel emailed again clarifying he was not asking about non-aggravated murder counts but rather consecutive aggravated murder counts. *Id.* In response, the ISRB indicated the offender would have a hearing at 25 years. On February 4, 2016, the ISRB answered another of counsel's questions regarding a hypothetical where an offender is sentenced to two 25 year consecutive terms on aggravated first degree murder. The Board informed counsel that the ISRB would see that offender after they complete their first 25 year term. *Id.*

On March 25, 2016, Phet was resentenced by the superior court. Exhibit 2. On April 11, 2016, counsel for Phet asked the Board whether Phet would have a hearing on the non-aggravated murder convictions at 20 years and another hearing at 25 years or something else. *Id.* The Board informed counsel that due to the complex nature of Phet's sentence the Board needed to gather additional information. *Id.* On July 22, 2016, the Board responded to counsel noting the terms that remained from the original judgment and sentence as well as the new terms in the addendum. *Id.* Specifically, the Board noted that the judgment and sentence and addendum require the ten 60 month firearm enhancements to run consecutively as flat time. *Id.* Phet will begin serving the base sentence on the first of his 10 convictions after serving the mandatory firearm enhancements. *Id.*

III. STANDARD OF REVIEW

A petitioner who challenges a decision from which he has had "no previous or alternative avenue for obtaining state judicial review" must show he is under unlawful restraint under the provisions of RAP 16.4(c). *In re Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). The petitioner may obtain relief by showing either a constitutional violation or a violation of state law. *Cashaw*, 123 Wn.2d at 148; RAP 16.4(c)(2), (6). Interpretation of a statute is a question of law that the Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Alleged violations of the prohibition against ex post facto laws are also reviewed de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 474-77, 150 P.3d 1130 (2007).

IV. ISSUES PRESENTED

1. Is Phet under unlawful restraint pursuant to RCW 9.94A.730 which allows an offender to petition for early release after serving 20 years?

V. ARGUMENT

A. Phet Is Not Under Restraint Pursuant to RCW 9.94A.730 Because that Statute Is Not Applicable to An Offender Sentenced Under RCW 10.95.030

Pursuant to RCW 9.94A.730(1), any person convicted of one or more crimes prior to their eighteenth birthday may petition the indeterminate sentence

review board for early release after serving no less than 20 years total confinement. However, a person may not petition for release pursuant to this statute if the person's current sentence was imposed under RCW 10.95.030. Of Phet's 10 convictions, 5 of those convictions were imposed pursuant to RCW 10.95.030. Therefore, RCW 9.94A.730(1) is not applicable to Phet. It is Phet's convictions of aggravated first degree murder which exclude him from any meaningful consideration under RCW 9.94A.730.

Phet argues the Board has changed its position regarding Phet's ability to petition for release at 20 years but a review of the emails contradicts that suggestion. The only time the Board stated a person would have a hearing at 20 years was in response to counsel's general question about consecutive and concurrent sentences and the Board's policy. *See* Petition, at Attachment. There is no indication at this point during the email exchanges that counsel was asking about a sentence including both non-aggravated murder and aggravated murder counts.

Nonetheless, even assuming RCW 9.94A.730(1) were applicable to Phet's sentence, the statute simply states that Phet *may* file a petition. Phet has not filed a petition therefore RCW 9.94A.730 is inapplicable. The fact that Phet disagrees with the Board's structuring of his sentence and he may not obtain the relief he seeks in the event he were to file a petition does not trigger application of RCW 9.94A.730.

A petitioner is entitled to relief in a personal restraint petition only if he can demonstrate that he was actually prejudiced by constitutional error. *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992) (*Rice II*). The petitioner must demonstrate by a preponderance of the evidence that the constitutional error caused him actual and substantial prejudice. *In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner does not demonstrate actual prejudice, his petition must be dismissed. *In re Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

When referring to a defendant's sentence, it is typically meant to refer to the entire sentence imposed in the judgment and sentence. In *State v. Haddock*, 141 Wn.2d 103, 107, 3 P.3d 733 (2000), the Court referred to Haddock's sentence as a standard range sentence of 186 months in prison. This 186 month sentence referred to Haddock's total sentence on multiple convictions for unlawful possession of a firearm and possession of stolen firearms. *Haddock*, 141 Wn.2d at 121 n.1. *See also In re Long*, 117 Wn.2d 292, 815 P.2d 257 (1991) (Referring to an offender's entire sentence when determining the consecutive or concurrent nature of a concurrent sentence relevant to a prior sentence); *State v. Klump*, 80 Wn. App. 391, 393, 909 P.2d 317 (1996) (Referring to Defendant's sentence for convictions of threatening a law enforcement officer and being a felon in possession as the federal sentence). By way of analogy, a defendant could be convicted of multiple counts in one

judgment and sentence, but receive the death penalty on only one count. This defendant's sentence would be referred to as a death penalty sentence. A distinction would not be made between the death sentence and the remaining counts.

Certainly there may be instances where a sentence could refer to each count separately but that interpretation does not make sense in the context of considering the relationship between RCW 9.94A.730 and RCW 10.95.030. Under Phet's interpretation of the statute, the Board would be required to entertain a petition for early release despite the fact that under no circumstance could it release Phet due to his five aggravated first-degree murder convictions. The Board would be required to engage in meaningless assessments of the offender and hold a hearing to discuss Phet's release despite the fact that he cannot be released at 20 years on his aggravated murder convictions and firearm enhancements. The Board would also be required to provide opportunities for the victims and survivors of the victims to provide statements in a hearing that would never result in Phet's release. Allowing a defendant like Phet convicted of aggravated first-degree murder to petition for early release under RCW 9.94A.730 would be an exercise in futility.

Had Phet only been convicted of five counts of first-degree assault, or other non-homicide crimes, he would be entitled to a hearing at 20 years after filing a petition for early release. But the fact remains that any juvenile

convicted of aggravated first-degree murder cannot be released from prison without serving a mandatory 25 years. *See* RCW 9.94A.540(1)(e). As a result of his aggravated first-degree murder convictions, Phet cannot demonstrate that he has suffered or will suffer actual prejudice regarding his assault convictions. Even assuming Phet filed a petition for early release and it was granted on those convictions, he would remain in prison serving the sentence on his aggravated first degree murder convictions and enhancements. Any other interpretation of RCW 9.94A.730 and RCW 10.95.030 would render nugatory the effect and purpose of each.

And the Board is not required to ignore the sentence of the superior court. Phet was sentenced to multiple firearm enhancements and 25 years to life on counts one through five for aggravated first degree murder. The Board can certainly decide to structure Phet's sentence to run the firearm enhancements first on the aggravated first degree murder convictions at the very least. "If enhancement time runs at the end of an offender's sentence, the offender has no incentive to behave well during that time because an offender serving enhancement time 'shall not receive any good time credits or earned early release time for that portion of his or her sentence that results from any deadly weapon enhancements.'" *In re King*, 146 Wn.2d 658, 664, 49 P.3d 854 (2002). "This sensible approach gives full effect to the entire statute and recognizes the

Legislature does not force prisoners to earn the same earned early release credit twice." *Id.*

Phet's claim that he is entitled to a release hearing next year when he has served 20 years is without merit. RCW 9.94A.730 is inapplicable to Phet because his judgment and sentence includes convictions for aggravated first-degree murder under RCW 10.95.030.

B. The Pierce County Prosecutor is the Proper Respondent for Claims One and Three

It appears from Phet's response to the motion to determine whether other remedies exists, that this petition concerns only the Board's actions as it relates to claim two.

Claims one and three pertain to Phet's sentence imposed by the superior court to which only Phet and the prosecutor's office were parties. The Board does not have authority at a sentencing hearing to recommend a particular sentence. Rather the Board's role is to administer the sentence imposed and it does not take a position on Phet's claims one and three.

However, the Board will certainly respond to the first and third claims if directed to do so by the Court.

VI. CONCLUSION

Phet is not unlawfully restrained. Respondent respectfully requests that the Court dismiss Phet's personal restraint petition with prejudice.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Mandy L. Rose
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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the foregoing RESPONSE OF THE INDETERMINATE SENTENCE REVIEW BOARD TO PERSONAL RESTRAINT PETITION AND MOTION TO DETERMINE REMEDIES with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

JAMES S SCHACHT
DEPUTY PROSECUTING ATTORNEY
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621 SW MORRISON STREET SUITE 1025
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 21st day of April, 2017, at Olympia, Washington.

s/ Katrina Toal
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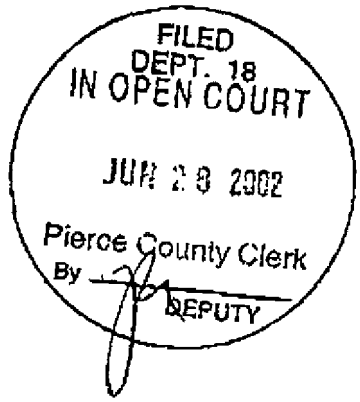
Exhibit 1



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUN 28 2002

STATE OF WASHINGTON, Plaintiff, vs. JOHN PHET, Defendant. DOB: [redacted] SID NO.: WA18629069	CAUSE NO.98-1-03162-1 JUDGMENT AND SENTENCE (JS) [✓] Prison [ ] Jail One year or less [ ] First Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Breaking The Cycle (BTC)

I. HEARING

1.1 A sentencing hearing in this case was held on June 28, 2002 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on the 27th day of June, 2002 by

[ ] plea [X] jury-verdict [ ] bench trial of:

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Exhibit 1

Count No.: I
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: II
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: III
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: IV
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: V
Crime: AGGRAVATED MURDER IN THE FIRST DEGREE, Charge Code: (D21)
RCW: 9A.32.030(1)(a), 10.95.020(10), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: VI
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: VII
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

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98-1-03162-1

Count No.: VIII
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: IX
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

Count No.: X
Crime: ASSAULT IN THE FIRST DEGREE, Charge Code: (E23)
RCW: 9A.36.011(1)(a), 9A.08.020, 9.41.010, 9.94A.310, and 9.94A.370
Date of Crime: 07/05/1998
Incident No.: TPD 98-186-0260

as charged in the Amended Information.

[✓] A special verdict/finding for use of a firearm was returned on Count(s) I - X. RCW 9.94A.125, .310.

[ ] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s)_____.RCW 9.94A.125, .310.

[ ] A special verdict/finding of sexual motivation was returned on Count(s)_____. RCW 9.94A.127.

[ ] A special verdict/finding for violation of the Uniform Controlled Substances Act was returned on Count(s)_____, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, or within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local government authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine when a juvenile was present in or upon the premises of manufacture was returned on Count(s) _____. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.

[ ] The defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

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[ ] This case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.129.

[ ] The crime charged in Count(s)_____involve(s) domestic violence.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):
NONE KNOWN OR CLAIMED.

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

[ ] the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

Count	Offender Score	Serious Level	Standard Range (w/o enhancement)	Plus Enhancement*	Total Standard Range	Maximum Term
I	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	LIFE+60 MOS	LIFE W/O
II	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	LIFE+60 MOS	LIFE W/O
III	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	LIFE+60 MOS	LIFE W/O
IV	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	LIFE+60 MOS	LIFE W/O
V	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	LIFE+60 MOS	LIFE W/O
VI	0	XII	93-123 MOS	FASE 60 MOS	153-183 MOS	LIFE
VII	0	XII	93-123 MOS	FASE 60 MOS	153-183 MOS	LIFE
VIII	0	XII	93-123 MOS	FASE 60 MOS	153-183 MOS	LIFE
IX	0	XII	93-123 MOS	FASE 60 MOS	153-183 MOS	LIFE
X	0	XII	93-123 MOS	FASE 60 MOS	153-183 MOS	LIFE

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present.

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2.4 [ ] EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [X] as follows:

LIFE WITHOUT PAROLE

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ]The Court DISMISSES Count(s)_____. [ ] The defendant is found NOT GUILTY of Count(s)_____.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA 98402):

$_____ Restitution to: Set by Separate order

$_____ Restitution to:_____

$_____ Restitution to: _____
(Name and Address-address may be withheld and provided confidentially to Clerk's Office).

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98-1-03162-1

$ 500	Victim assessment	RCW 7.68.035
$ 110	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
	Criminal filing fee $	
	Witness costs $	
	Sheriff service fees $	
	Jury demand fee $	
	Other $	
$	Fees for court appointed attorney	RCW 9.94A.030
$	Court appointed defense expert and other defense costs	RCW 9.94A.030
$	Fine RCW 9A.20.021 [ ] VUCSA additional fine waived due to indigency	RCW 69.50.430
$	Drug enforcement fund of	RCW 9.94A.030
$	Crime Lab fee [ ] deferred due to indigency	RCW 43.43.690
$	Extradition costs	RCW 9.94A.120
$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
$	Other costs for:	
$ 610	TOTAL	RCW 9.94A.145

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed order may be entered. RCW 9.94A.142. A restitution hearing:
[ ] shall be set by the prosecutor
[X] is scheduled for 8/9/02

[ ] RESTITUTION. See attached order.
[X] Restitution ordered above shall be paid jointly and severally with: Saron Nyeth 98-1-03160-5, Timmee Chea 98-1-03157-5, Marvin Lee 98-1-03161-3, Veasna Sak 98-1-03163-0, John Chak 01-1-01577-1

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NAME OF OTHER DEFENDANT	CAUSE NUMBER	VICTIM NAME	AMOUNT-$

[ ] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.145.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with John Chase or Deanna Sacks and their families. Named victims and their families (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

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4.4 OTHER: _____

4.4(a) Bond is hereby exonerated.

4.5 **CONFINEMENT OVER ONE YEAR:** The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

LIFE WITHOUT PAROLE Count No. I
LIFE WITHOUT PAROLE Count No. II
LIFE WITHOUT PAROLE Count No. III
LIFE WITHOUT PAROLE Count No. IV
LIFE WITHOUT PAROLE Count No. V
100 months on Count No. VI
100 months on Count No. VII
100 months on Count No. VIII
100 months on Count No. IX
100 months on Count No. X

(a)(i)CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No. I
60 months on Count No. II
60 months on Count No. III
60 months on Count No. IV
60 months on Count No. V
60 months on Count No. VI
60 months on Count No. VII
60 months on Count No. VIII
60 months on Count No. IX
60 months on Count No. X

Sentence enhancements in Counts I-X shall run
[ ] concurrent [✓] consecutive to each other.
Sentence enhancements in Counts I-X shall be served
[✓] flat time [ ] subject to earned good time credit.

Actual number of months of total confinement ordered is Life plus 1,100.
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3 above).

(b) **CONSECUTIVE/CONCURRENT SENTENCES.** RCW 9.94A.400. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

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All counts are Class A Serious Violent felonies and therefore run Consecutive to each other

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here.[ ] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

Confinement shall commence immediately unless otherwise set forth here:

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 1441 Days July 18, 1998 thru June 28, 2002

4.6 [✓] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count I	for 24 months;	Count VI	for 24 months;
Count II	for 24 months;	Count VII	for 24 months;
Count III	for 24 months;	Count VIII	for 24 months;
Count IV	for 24 months;	Count IX	for 24 months;
Count V	for 24 months;	Count X	for 24 months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement/custody offenses--serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense. Use paragraph 4.7 to impose community custody following work ethic camp.]

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While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.
[ ] Defendant shall have no contact with: _____
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to-wit: _____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total

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confinement. The conditions of community custody are stated in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

V. NOTICES AND SIGNATURES

5.1. **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4. **RESTITUTION HEARING.**
[ ] Defendant waives any right to be present at any restitution hearing (defendant's initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

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5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:
5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the State of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of the Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the

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institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 OTHER: _____

_____

DONE in Open Court and in the presence of the defendant this date:

June 28, 2002.

JUDGE Print Name:

Deputy Prosecuting Attorney
Print Name:
WSB# _____

Attorney for Defendant
Print name:
WSB# 8941

Refused but Present.
Defendant
Print name:

FILED
DEPT. 18
IN OPEN COURT
JUN 28 2002
Pierce County Clerk
By _____ DEPUTY

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98-1-03162-1

CERTIFICATE OF INTERPRETER

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 01-1-05626-5

I, Bob San Soucie, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the judgment and sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed on this date: JUL - 1 2002

Clerk of said County and State, by: Chris Hutton, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No.: WA18629069 Date of Birth: [redacted]
(If no SID take fingerprint card for WSP)

FBI No. UNKNOWN Local ID No. _____

PCN No. _____ Other _____

Alias name, SSN, DOB: _____

Race:	Ethnicity:	Sex:
[X] Asian/Pacific Islander	[ ] Hispanic	[X] Male
[ ] Black/African-American	[ ] Non-Hispanic	[ ] Female
[ ] Caucasian		
[ ] Native American		
[ ] Other: _____		

trp

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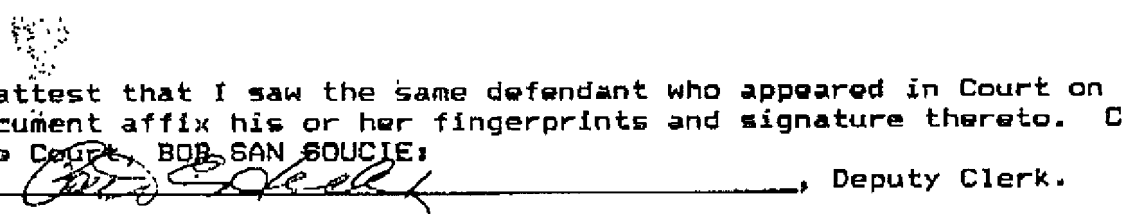
98-1-03162-1

FINGERPRINTS

FILED
DEPT. 18
IN OPEN COURT
JUN 28 2002
Pierce County Clerk
By DEPUTY

Right four fingers taken simultaneously | Right thumb

Left four fingers taken simultaneously | Left thumb



I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Clerk of the Court, BOB SAN SOUCIE:

_____, Deputy Clerk.

Dated: 6-28-02.

DEFENDANT'S SIGNATURE: _____

DEFENDANT'S ADDRESS: _____

_____

DEFENDANT'S PHONE#: _____

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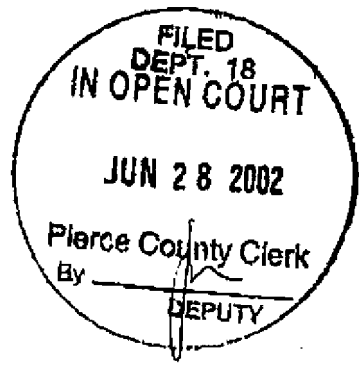

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUN 28 2002

STATE OF WASHINGTON, Plaintiff, vs. JOHN PHET, Defendant.	CAUSE NO. 98-1-03162-1 ADVICE OF RIGHT TO APPEAL AND COLLATERAL ATTACK TIME LIMITS

RIGHT TO APPEAL

Judgment and Sentence having been entered, you are now advised that:

1.1 You have the right to appeal:

[✓] a determination of guilt after a trial.

[ ] a sentencing determination relating to offender score, sentencing range, and/or exceptional sentence unless you have waived this right as part of a plea agreement.

[ ] other post conviction motions listed in Rules of Appellate Procedure 2.2.

1.2 Unless a notice of appeal is filed with the clerk of the court within thirty (30) days from the entry of judgment or the order appealed from, you have irrevocably waived your right of appeal.

1.3 The clerk of the Superior court will, if requested by you, file a notice of appeal on your behalf.

1.4 If you cannot afford the cost of an appeal, you have the right to have a lawyer appointed to represent you on appeal and to have such parts of the trial record as are necessary for review of errors assigned transcribed for you, both at public expense.

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COLLATERAL ATTACK

Pursuant to RCW 10.73.110, you are hereby advised of the following time limit regarding collateral attack:

RCW 10.73.090:

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of post conviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

RCW 10.73.100:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;

(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;

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(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, Section 9 of the State Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

I have been advised of the above time limit regarding collateral attack pursuant to statutes.

ACKNOWLEDGMENT:

Regarding the foregoing advice of my "Right to Appeal" and advice on "Collateral Attack":

1. I understand these rights; and

2. I waive formal reading of these rights; and

3. I acknowledge receipt of a true copy of these rights.

DATE: June 28, 2002 DEFENDANT: Refused but present.

DEFENDANT'S ATTORNEY: Tom O. Jaenicke #6196

DATE: June 28, 2002 JUDGE:

FILED
DEPT. 18
IN OPEN COURT
JUN 28 2002
Pierce County Clerk
By

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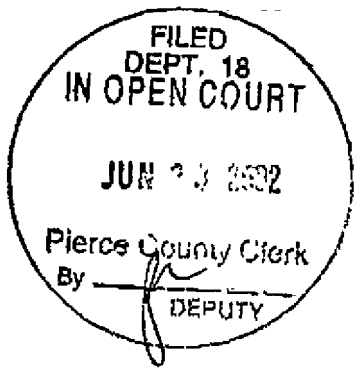

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JUN 28 2002

STATE OF WASHINGTON, Plaintiff, vs. JOHN PHET, Defendant.	CAUSE NO. 98-1-03162-1 ORDER FOR BLOOD SAMPLE DRAW FOR DNA IDENTIFICATION ANALYSIS

THIS MATTER having come on regularly before the undersigned Judge for sentencing following defendant's conviction for:

[ ] A felony sex offense as defined by RCW 9.94A.030(33), to wit:

_____

and/or

[X] A violent offense as defined by RCW 9.94A.030(38), to wit:

Aggravated Murder 1 x 5, Assault 1 x 5

which occurred after July 1, 1990.

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Pursuant to RCW 43.43.754, therefore, it is hereby ordered that the defendant submit to a blood draw to be used for DNA identification analysis as follows:

PLACE TO BE TESTED

[ ] (Out-of-Custody) Report immediately to the Pierce County Jail for a blood sample draw; or

[✓] (In-Custody DOC) Submit to the blood sample draw by the Department of Corrections.

[ ] (In-Custody PC Jail) Submit to blood sample draw by the Pierce County Jail.

DONE IN OPEN COURT this 28th day of June, 2002.

JUDGE

FILED
DEPT. 18
IN OPEN COURT
JUN [illegible] 02
Pierce County Clerk
By _____ DEPUTY

Presented by:

PHILIP K. SORENSEN
Deputy Prosecuting Attorney
WSB# 16441

Approved as to form:

SVERRE STAURSET
Attorney for Defendant
WSB# 8996

trp

STATE OF WASHINGTON, County of Pierce ss: I, Bob San Soucie, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the seal of said Court this _____ day of _____, 20__
Bob San Soucie, Clerk
By _____ Deputy

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Telephone: (253) 798-7400

Exhibit 2

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOHN PHET Defendant. SID: 18629069 DOB: [redacted]	CAUSE NO. 98-1-03162-1 JUDGMENT AND SENTENCE ADDENDUM SETTING MINIMUM TERMS FOR AGGRAVATED MURDER COUNTS PURSUANT TO RCW 10.95.030 AND .035. OTHER CONVICTIONS AND SENTENCES REMAIN FINAL PURSUANT TO RCW 10.95.035(4) (FJS) [x] Prison [x] Clerk's Action Required, para 3.3

I. HEARING

1.1 A hearing to set the minimum terms of confinement for convictions of aggravated murder was held and the defendant, the defendant's attorney and the deputy prosecuting attorney were present. This hearing was held pursuant to the provisions of RCW 10.95.030 and .035

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 RELEVANT OFFENSES FOR SETTING OF MINIMUM TERM OF CONFINEMENT:

The defendant was found guilty on June 27, 2002, by jury verdicts of the following relevant offenses as charged in the the June 10, 2002 Corrected Information:

COUNT	CRIME	RCW	SENTENCE ENHANCEMENT TYPE	DATE OF CRIME	INCIDENT NO.
I	AGGRAVATED MURDER IN THE FIRST DEGREE (D-21)	9A.32.030(1)(a) 10.95.020(10) 9A.08.020 9.41.010 9.94A.310 9.94A.370	FIREARM	07/05/1998	Tacoma Police Department Incident No. 98-186-0260

Exhibit 2

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COUNT	CRIME	RCW	SENTENCE ENHANCEMENT TYPE	DATE OF CRIME	INCIDENT NO.
II	AGGRAVATED MURDER IN THE FIRST DEGREE (D-21)	9A.32.030(1)(a) 10.95.020(10) 9A.08.020 9.41.010 9.94A.310 9.94A.370	FIREARM	07/05/1998	Tacoma Police Department Incident No. 98-186-0260
III	AGGRAVATED MURDER IN THE FIRST DEGREE (D-21)	9A.32.030(1)(a) 10.95.020(10) 9A.08.020 9.41.010 9.94A.310 9.94A.370	FIREARM	07/05/1998	Tacoma Police Department Incident No. 98-186-0260
IV	AGGRAVATED MURDER IN THE FIRST DEGREE (D-21)	9A.32.030(1)(a) 10.95.020(10) 9A.08.020 9.41.010 9.94A.310 9.94A.370	FIREARM	07/05/1998	Tacoma Police Department Incident No. 98-186-0260
V	AGGRAVATED MURDER IN THE FIRST DEGREE (D-21)	9A.32.030(1)(a) 10.95.020(10) 9A.08.020 9.41.010 9.94A.310 9.94A.370	FIREARM	07/05/1998	Tacoma Police Department Incident No. 98-186-0260

[X] A special verdict/finding for use of firearm was returned on Counts One through Five pursuant to former RCW 9.94A.125, and 9.94A.360.

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
	NONE KNOWN OR CLAIMED, OTHER CURRENT OFFENSES, ONLY					

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2.3 MINIMUM TERM SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE	MAXIMUM TERM
I	Nine+	XVI	LIFE W/O PAROLE	FASE 60 MOS	25 YEARS TO LIFE	LIFE W/O PAROLE
II	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	25 YEARS TO LIFE	LIFE W/O PAROLE
III	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	25 YEARS TO LIFE	LIFE W/O PAROLE
IV	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	25 YEARS TO LIFE	LIFE W/O PAROLE
V	0	XVI	LIFE W/O PAROLE	FASE 60 MOS	25 YEARS TO LIFE	LIFE W/O PAROLE

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

III. MINIMUM TERM OF CONFINEMENT.

3.1 CONFINEMENT. The defendant is sentenced to the following minimum terms of confinement pursuant to RCW 10.95.030(3)(a)(ii):

Count One: 25 years

Count Two: 25 years

Count Three: 25 years

Count Four: 25 years

Count Five: 25 years

The maximum term of confinement for Counts One through Five is LIFE WITHOUT PAROLE.

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

3.2 OTHER: The minimum terms of confinement set above in § 3.1 shall be served [ ] concurrently [ ] consecutively to each other, and shall be served [ ] concurrently [ ] consecutively to the sentences imposed for Counts Six through Ten in the original Judgment and Sentence that was entered in this case on June 28, 2002. Credit for time served shall be calculated starting on the day of the defendant's arrest, July 18, 1998. All other terms and conditions that are not modified by this addendum and which are set forth in the June 28, 2002, Judgment and Sentence remain in full force and effect.

3.3 THE CLERK OF THE SUPERIOR COURT shall physically attach a true and correct copy of this addendum to the June 28, 2002, Judgment and Sentence so that anyone viewing or obtaining a copy of the judgement will also view or receive a copy of this addendum.

DONE in Open Court and in the presence of the defendant this date: March 25, 2016

JUDGE

Print name: HONORABLE STANLEY J. RUMBAUGH

Deputy Prosecuting Attorney
Print name: JAMES SCHACHT
WSB #17298

Attorney for Defendant
Print name: JEFFREY ELLIS
WSB # 17139

Defendant
Print name: JOHN PHET

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOHN PHET, Defendant.	CAUSE NO: 98-1-03162-1 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence and this addendum. (Sentence of confinement in Department of Corrections custody).

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: March 25, 2016

By direction of the Honorable

JUDGE

CLERK

By: _____
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date _____ By _____ Deputy

STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk
By: _____ Deputy

SHS

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Exhibit 3

127 Wash.App. 1016

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
John PHET and Jimmie Chea, Appellants.

Nos. 29027–8–II, 29087–1–II.
|
May 3, 2005.

Appeal from Superior Court of Pierce County; Hon. Karen Strombom, J.

Attorneys and Law Firms

Rebecca Wold Bouchey, Attorney at Law, Mercer Island, WA, Stephanie C. Cunningham, Rita Joan Griffith, Attorney at Law, Seattle, WA, for Appellants.

Kathleen Proctor, Pierce County Prosecuting Atty. Ofc., Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

HOUGHTON, J.

***1** Jimmee Chea and John Phet appeal from their convictions of five counts of first degree aggravated murder and five counts of first degree assault, arguing numerous grounds.[1] We affirm.

FACTS[2]

On July 5, 1998, at approximately 1:45 a.m., several gunmen burst into Tacoma's Trang Dai Café and opened fire on the patrons, killing five people and wounding five others.[3] Later, forensic officers collected 52 shell casings in and around the café.[4]

Tacoma Police Department (TPD) officers retrieved a neighboring business videotape recording of the alley behind the café. It revealed two vehicles backing into the alley minutes before gunfire erupted. Based on prior armed assault reports, TPD detectives recognized Chea's silver or gray vehicle. They knew Chea as a member of the LOC's Out Crips (LOC's), a local gang. The detectives then began watching Chea's residence, where they observed that a silver Honda parked there closely matched the Honda in the videotape.

The headlights of a white car displayed in the video illuminated the ground in an unusual pattern. The day after the shootings, a detective who had watched the video observed a car with similar headlights. A records check revealed that the car belonged to Veasna Sok.

The detectives interviewed some of the surviving café patrons. They learned that, in March 1998, one of the people injured in the shootings, Son Kim, fought with Ri Le at the café. Kim told the detectives that he suspected Le's involvement in the shootings and that he, Kim, was the intended target. The detectives focused their investigation on Le, Chea, and their associates. Later investigation revealed Phet's participation in the crimes.

At 6:00 a.m. on July 18, the detectives served search warrants at nine different locations[5] and took approximately 20 people, including Sok, Sarun Ngeth, and Thanna John Chak, to the police station for questioning.[6] On July 19, Marvin Leo was taken from his residence to the police station for questioning. At the police station, these individuals gave statements implicating themselves and others.[7]

Authorities also contacted Phet and Chea while executing the warrants and transported them to the TPD for interviews. The TPD kept Chea and Phet at the station from approximately 6:00 a.m. until late afternoon, when they were interviewed.

A guard held Chea in a captain's office awaiting his interview. No one asked Chea questions. The guard attended to Chea's personal needs. On July 18, at 4:05 p.m., a detective advised Chea of his Miranda[8] rights and began interviewing him. Chea stated that he understood those rights and he wished to waive them. He then signed the advisement of rights form in the presence of Detectives Davidson and Ringer. During the interview, Chea denied any involvement in the shootings.

The TPD also held 16–year–old Phet, without interviewing him, from approximately 6:00 a.m. until 5:05 p.m., when he received his Miranda warnings. Phet orally acknowledged that he understood his rights and that he wished to waive them and speak to the police. Phet

also signed the standard advisement of rights form.[9] Phet did not acknowledge involvement in the shootings.

***2** The State charged Chea and Phet with five counts of first degree aggravated murder and five counts of first degree assault. The State alleged a firearm enhancement on each count.[10]

The State sought a pretrial ruling on the admissibility of Chea's and Phet's involvement with the LOC's gang. Judge Tollefson ruled the evidence inadmissible because the State failed to show a nexus between the café shooting and advancement of any gang-related activity. Judge Tollefson reasoned that the shooting at the Trang Dai Café was not a gang-related crime because there was no basis to believe that the LOC's gang or one of its members would benefit from the shooting. Instead, Judge Tollefson found that the shooting was motivated by Le's desire for revenge against Kim. Because Le was not a member of LOC's gang, the judge believed that the shooting was not gang-related. Therefore, Judge Tollefson ruled that the State failed to show that a nexus existed between the shooting at the café and the advancement of some gang purpose.

Later, Judge Hogan agreed to reconsider Judge Tollefson's ruling regarding the gang affiliation evidence. Judge Hogan ruled that the State could raise the issue through an offer of proof. The State presented its offer of proof through Davidson's declaration dated June 11, 2001.[11] Ultimately, Judge Strombom admitted the evidence of gang affiliation.

On August 3, 1999, while in custody, Chea and Phet assaulted Sok, who agreed to testify against Chea and Phet under his plea agreement .[12] The State moved to admit the evidence of this assault through the testimony of escorting officers. Judge Tollefson granted the State's motion; he stated that the evidence indicated that Chea and Phet knew that Sok had agreed to testify and that was the reason for the assault.[13]

Before trial, the State moved to exclude any evidence of alleged gambling or narcotics activity at the Trang Dai Café on the grounds that such evidence constituted irrelevant hearsay. Judge Tollefson granted the State's motion.[14]

At trial, Sok, who had been a member of the LOC's gang for a couple of years before the shooting, testified. He said that on the evening of the shooting, he left home with his 9 millimeter handgun, which he carried to protect himself against other gangs' members.

Sok went to Ngeth's house, where he picked up Ngeth and Leo; Ngeth was armed with his .380 and Leo took Sok's 9 millimeter. While they drove around, Khanh Trinh called them to find out whether Sok wanted to 'put in work' that night. Report of Proceedings (RP) at 4388. Sok understood the term 'put in work' meant a drive-by shooting. RP at 4388.

Sok, Ngeth, and Leo waited about 10 minutes before Chea showed up in his car; Chea wore red clothes. Le, Samath Mom, Trinh, and Phet were in Chea's car. Chea asked if they wanted to 'put in work'; Le mentioned that he wanted to 'get' Kim at the Trang Dai Café. RP at 4396. Sok understood this to mean to shoot Kim.

***3** Next, Chak testified that he belonged to the LOC's gang. On July 4, 1998, Chea called Chak and invited him over to Le's house. Chea wore red clothes. He drove his gray/silver Honda Civic and picked up Chak for the ride to Le's house. Phet and Mom were already there. Chea and Le talked about Kim 'mean mugging' Chea, a sign of disrespect that could trigger violent retaliation.[15] At one point, Le and Khanh left the house for awhile and returned with red clothing. Eventually everybody got into cars and met other LOC's members.

Chak further testified that Sok and his carload and Chea and his carload drove to the market. Chea told Chak to call the café to learn whether Kim remained there. When Kim answered, Chak hung up. Both cars then drove into the alley behind the café. The cars went down the alley twice, the second time backing into it so that they could leave without driving the wrong way on a one-way street. Chak also testified that Chea stayed in his car, and Sok and Ngeth stayed in Sok's car; everyone else got out and took guns from Chea's car trunk. Le told Khanh and Phet to guard the back door and to shoot if anyone came out. Leo, Le, Mom, and Chak headed for the front door; Chak opened the door and everyone rushed in and opened fire. After a short time, the three backed out of the door while Le continued to fire through the wall as they retreated to their cars. By the time Chak and others returned to their cars, Phet and Khanh were already in their car. After the shooting, they all returned to Le's house.

Davidson testified as an expert on gang culture. He opined that gang crimes may include all kinds of assaults, threats, intimidation, physical beatings, nonfatal shootings, stabbings, and homicides. He also stated that gangs were generally formed to make profits, to protect individual members, and to 'gang bang' or commit violence; that 'OG's'[16] exerted influence over younger gang members; and that gang members would dress in another gang's color when carrying out a drive-by

shooting in order to level blame on members of a rival gang.[17]

The detective identified Chea as one of the LOC's 'OG's.' RP at 3408. Davidson and other witnesses explained gang hand signals, signs, and tattoos, and provided LOC's members' names. Jurors reviewed one photograph of some LOC's gang members, including Chea and Phet.[18]

The jury found Chea and Phet guilty as charged, including the firearm enhancements. Chea and Phet appeal.

ANALYSIS

I. Charging Document

For the first time on appeal, Phet and Chea contend that the information charging them with first degree aggravated murders did not contain all the essential elements of the crime. They assert that the State did not identify the intended victim of the charged premeditated murder.

An information must contain all essential elements of a crime, statutory or otherwise, in order to give notice to the accused of the nature and cause of the action against him. *State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Where the challenge to the sufficiency of the charging document is raised for the first time after the verdict, we construe the document liberally in favor of its validity. *Kjorsvik,* 117 Wn.2d at 105.

***4** The State charged as follows:

> That JIMMEE CHEA and JOHN PHET, acting as accomplices of each other and of Ri Ngoc Le, Samath Mom, Khanh Van Trinh, Sarun Truck Ngeth, Marvin Lofi Leo, Veasna Sok, and Thanna John Chak as defined in RCW 9A.08.020, in Pierce County, on or about the 5th day of July, 1998, did unlawfully and feloniously with premeditated intent to cause the death of another person, shoot { a name of each homicide victim} , thereby causing the death of { victim's name} , a human being, who died on or about the 5th day of July, 1998 ... contrary to RCW 9A.32.030(1)(a) and RCW 10.95.020(10).

Clerk's Papers (CP) (Chea) at 757–63; CP (Phet) at 1255 (emphasis added).

RCW 9A.32.030(1)(a) provides: 'A person is guilty of murder in the first degree when { } { w} ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.' RCW 10.95.020 provides: 'A person is guilty of aggravated first degree murder ... if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a) ... and one or more of the following aggravating circumstances exist: ... (10) There was more than one victim and the murders were part of a common scheme or plan.'

Nothing in these statutes specifies that the victim's name is an element of the crime. Nor do Chea and Phet cite any case law establishing that the victim must be named. To the contrary, in *State v. Plano,* 67 Wn.App. 674, 679–80, 838 P.2d 1145 (1992), Division One held that the victim's name is not an element of the crime charged. We agree. The argument fails.

II. Chea's and Phet's Custodial Statements

Chea and Phet further contend that the trial court erred in admitting their statements made to the police because the officers failed to advise them of their Miranda rights and their right to counsel 'as soon as feasible' as required by CrR 3.1.[19]

Miranda, 384 U.S. at 444–45, requires that prior to a custodial interrogation, a defendant must be informed of his or her constitutional rights. CrR 3.1 goes beyond the requirements of Miranda and requires that a defendant be advised of his right to counsel immediately upon being taken into custody. *State v. Dunn,* 108 Wn.App. 490, 494, 28 P.3d 789 (2001), *aff'd,* 148 Wn .2d 193 (2002).

Chea and Phet failed to raise a CrR 3.1 argument below and, thus, did not preserve it on appeal. RAP 2.5(a).[20] We do not address this argument further.[21]

III. Evidence Rulings

A. Changing Another Judge's Ruling

Chea and Phet next contend that Judge Hogan had no authority to reconsider Judge Tollefson's earlier ruling excluding evidence of gang affiliation and Judge Strombom erred in later admitting it.

The orderly administration of justice requires that the trial

court, after having full opportunity to hear, consider, and decide all material questions of the case, enters formal judgment resolving those questions. *Snyder v. State*, 19 Wn.App. 631, 635–36, 577 P.2d 160 (1978). In managing litigation, the trial court must have wide discretion and authority, including the power to issue interlocutory orders. *Snyder*, 19 Wn.App. at 636. These orders or rulings may be changed, modified, revised, or eliminated as the case progresses. *Snyder*, 19 Wn.App. at 636.

***5** Here, Judge Tollefson initially denied the admission of evidence of gang affiliation: 'Unless the State can provide a nexus ... where there was a relationship to the crime and the crime relates to true gang activities, such as securing your turf or enhancing your reputation with the gang, ... I don't think that the State has shown a nexus.... I am going to rule that { this evidence is not} admissible at this time.' RP (02/14/00) at 77–78. Later, Judge Hogan reconsidered and granted the State's motion to admit evidence of gang affiliation, finding it relevant to the relationship of the participants in the crime.[22]

The record discloses that Judge Tollefson entered a preliminary ruling on the admissibility of gang-related evidence based on the State's lack of evidence. Later, after the State more fully developed its evidence and argument and submitted an offer of proof, Judge Hogan modified the ruling, and during trial Judge Strombom admitted it. Under these facts, they did not err in doing so.

B. Gang Association Evidence

1. Expert Qualifications

Chea and Phet also argue that the detective lacked expert qualifications to testify about gangs.[23] We review a trial court decision as to expert qualification for abuse of discretion. *State v. Zunker*, 112 Wn.App. 130, 140, 48 P.3d 344 (2002), *review denied*, 148 Wn.2d. 1012 (2003).

Davidson detailed his training and experience involving gang crimes and gang-related activities. He had 16 hours of training on gangs. He attended the National Law Enforcement Institute Advanced Gang Conference. He had experience with gang activities as a patrol officer since 1987 and as a detective since 1994. He had investigated hundreds of gang-related crimes and had hundreds of gang-related interactions.

Although the detective's classroom training may have been minimal, an expert may be qualified to express opinions based on experience. ER 702.[24] The trial court did not abuse its discretion in allowing the detective to testify about gangs and gang-related activities.

2. Nexus between Crime Charged and Gang Association

Chea and Phet further contend that the trial court erred in admitting gang-related evidence. They assert an insufficient nexus existed between gang association and the crimes.[25] They also argue that the trial court erred in allowing Davidson to testify as a gang expert because nothing in his testimony assisted the jury in understanding the evidence presented or determining a fact in issue.

The trial court allowed Davidson to testify as an expert on gang culture. He stated that gang crimes may include all kinds of assaults, threats, intimidation, physical beatings, nonfatal shootings, stabbings, and homicides. He explained the meaning of gang terminology and symbols, including 'mean mugging' and 'putting in work,' gang criminal activities, gang codes of conduct and discipline, gang interactions with other gangs and prospective gang members, and gang organizational structure and history.

***6** Davidson identified Chea as one of the LOC's 'OG's.' RP at 3408. He provided the names of the LOC's members. And jurors also saw pictures of some LOC's gang members, including Chea and Phet, making gang signs. Co-defendants Sok and Chak testified that Phet and Chea participated in the shooting in retaliation for Kim's 'mean mugging' Chea, and for Kim's fight with Le. Chea was a gang member and Le was gang affiliate. Both witnesses stated that, in gang culture, an act of disrespect provides grounds for retaliation and murder. They noted that the assailants, including Chea and Phet, purposefully donned red clothing before the shooting to distract from their gang's involvement. We review trial court evidentiary decisions for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To preserve an evidentiary issue, a party objecting to the admission of the evidence must have made a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986).

Evidence of other crimes or bad acts may be admitted under ER 404(b)[26] as proof of premeditation, intent, motive, and opportunity. Evidence of prior misconduct and previous quarrels may be admissible to show motive. *State v. Powell*, 126 Wn.2d 244, 260, 893 P.2d 615 (1995). Evidence of a defendant's gang membership may be relevant to show motive where the trial court finds a sufficient nexus between gang affiliation and motive for committing the crime. *State v. Boot*, 89 Wn.App. 780,

789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998). But evidence of gang membership lacks probative value 'when it proves nothing more than a defendant's abstract beliefs.'[27] *State v. Campbell*, 78 Wn.App. 813, 822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).[28] It has probative value, however, when it proves premeditation, intent, motive, or the bias of a witness. *United States v. Abel*, 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (bias and motive of witness);[29] *State v. Johnson*, 124 Wn.2d 57, 69, 873 P.2d 514 (1994) (motive); *Boot*, 89 Wn.App. at 789 (premeditation).[30]

Here, the challenged evidence tended to prove the State's theory—that Chea and Phet were gang members who responded with violence to any challenges from others. As in Campbell, Boot, and Abel, the evidence here showed that both Chea and Phet were gang members; that one of the gang's tenets was to retaliate for 'disrespect'; and that Kim exhibited disrespect when he 'mean mugged' Chea and fought with Le, a gang affiliate. The evidence of gang affiliation also showed that another tenet was intra-group loyalty and, inferentially, that the other gang members would retaliate if their fellow member had been treated disrespectfully.

***7** The evidence also shows that Chea and Phet considered their actions and took deliberate steps to accomplish their goal. Although gang affiliation evidence may be suggestive of violent activity, and thus prejudicial, the evidence placed the relationship of the intended victim, Kim, and Chea and Phet in context and revealed the implications of a person 'mean mugging' a gang member.

The trial court properly admitted this evidence as probative of Chea's and Phet's premeditation, motive, and intent. The evidence had probative value that outweighed its prejudicial effect.[31]

C. August 3, 1999 Assault on Veasna Sok

Chea and Phet further contend that the trial court erred in admitting evidence of their assault on Veasna Sok. They assert that it was irrelevant and unfairly prejudicial. Phet also argues that the trial court erred in not holding a preliminary hearing about the assault.

Generally, a court may admit evidence that a defendant threatened a witness as implication of guilt. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). Where relevant, such evidence may be admitted after a proper ER 404(b) balancing. *State v. McGhee*, 57 Wn.App. 457, 460, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990). Evidence of threats may be relevant if it connects the defendant to the crime and shows guilty knowledge. *McGhee*, 57 Wn.App. at 460–61.

Here, the State introduced evidence of the assault through the testimony of four officers and the victim, Sok. The trial court ruled that the State could introduce evidence of this incident because Chea and Phet knew that Sok was going to testify for the State. The trial judge ruled:

> It is my conclusion that the probative value outweighs the prejudicial effect of this testimony. The actions of these two defendants against a co-defendant who has made a deal with the State speaks volumes as to guilty knowledge and identity.
>
> ... The assault occurred after the announcement by the State that Sok had reached a deal with the State and would testify on behalf of the State.

RP at 2356. The trial court also noted that '{ c} alling someone a snitch further supports the conclusion they knew Veasna Sok was going to testify against them. There is no need for an ER 404(b) preponderance hearing regarding the assault of August 3, 1999 .' RP at 2355–56.

Before the evidence was introduced, the trial court gave the jury the following limiting instruction:

> You are about to hear evidence on the subject of the August 3, 1999 assault on Veasna Sok alleged to have been committed by Jimmee Chea and John Phet.
>
> Before this evidence is allowed the court advises you that you may consider the evidence only for the limited purpose of establishing the defendants' consciousness of guilt of the crimes charged in this case.
>
> You must not consider the evidence for any other purpose unless instructed otherwise. It is up to you to determine how much weight, if any, is to be given this evidence.
>
> ***8** You are further instructed that statements attributable to one of the defendants are not attributable to the other defendant and can not { sic} be used as evidence against the nonspeaking defendant.

RP at 3827. Thus, the trial court properly limited the evidence to show Chea's and Phet's guilty knowledge. It did not abuse its discretion in doing so.

Phet further contends that the trial court erred in not holding a preliminary hearing to determine, by a preponderance of the evidence, whether he ever called Sok a 'snitch' during the assault.

When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), we may decide issues of admissibility. *McGhee*, 57 Wn.App. at 460. In affirming this court's holding in *State v. Kilgore*, 147 Wn.2d 288, 294–95, 53 P.3d 974 (2002), our Supreme Court noted:

> Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial. We should be slow, therefore, to allow defendants to confront the witnesses twice, particularly where testifying just once can be a difficult experience for any witness. We believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred. We recognize, as did the Court of Appeals, that there may be instances where the trial court cannot make the decision it must make based simply on an offer of proof. In such cases, it would be entirely proper for the court to conduct an evidentiary hearing outside the presence of the jury. The decision whether or not to conduct such a hearing, though, should be left to the sound discretion of the trial court. We conclude, finally, that there was no error here on the part of the trial court in allowing the evidence of prior bad acts to come in following the State's offer of proof.

Here, the record shows that the trial judge considered the issue of holding an evidentiary hearing and properly exercised its discretion by not doing so.

D. Unlawful Activities at Trang Dai Cafè

Chea and Phet contend that the trial court improperly excluded evidence of unlawful drug and gambling activities at the Trang Dai Cafè.[32] Chea and Phet argue that their theory of the case—owing Phat Nguyen, the cafè's owner, thousands of dollars in gambling debts—provided the motive for the shooting. They assert that the evidence of unlawful drug activity at the cafè was probative of their theory of the case.[33]

A defendant has a constitutional right to present a defense consisting of admissible relevant evidence. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, cert. denied, 508 U.S., 953 (1993). Under ER 401, evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence. Relevant evidence may still be excluded if its probative value is outweighed by its prejudicial effect, or its tendency to confuse the issues, mislead the jury, or cause an undue delay, waste of time, or needless presentation of cumulative evidence.[34] ER 403.

***9** Nevertheless, a criminal defendant 'does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). The proffered evidence is not relevant to rebut the evidence presented against defendants if it was offered solely to encourage the jury to speculate as to possible other assailants. *State v. Drummer*, 54 Wn.App. 751, 755, 775 P.2d 981 (1989).

In this case, Chea and Phet argue that the evidence of unlawful drug activity at the cafè was relevant because it established that Le owed money to the cafè owner and that the motive for the shooting at the cafè was that debt, not Chea being 'mean mugged' by Kim. In order to present evidence of this debt, it was necessary to admit evidence of other people's unrelated unlawful activities. But Chea and Phet never offered evidence of this debt at trial. The trial court did not abuse its discretion in excluding evidence of unlawful activities at the cafè.

E. Assault on Veasna Sok's Brother

Chea and Phet next contend that the trial court improperly permitted Sok to testify that he backed out of his first plea agreement with the State because someone had shot at his younger brother, Ratthana Sok. The trial court admitted this evidence because defense counsel opened the door to

it.[35]

Generally, when a subject has been opened during examination, the opponent may develop and explore the various phases of that subject. *State v. Hayes*, 73 Wn.2d 568, 571, 439 P.2d 978 (1968) (citing *Wilson v. Miller Flour Mills*, 144 Wash. 60, 66, 256 P. 777 (1927); *State v. West*, 70 Wn.2d 725, 424 P.2d 1014 (1967)). In *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), our Supreme Court noted:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

In the present case, during Davidson's cross-examination, Chea's counsel asked why the State offered Sok a new plea agreement in February 2001.[36] Before starting redirect, the State asked for a hearing outside the presence of the jury indicating that, in response to Chea's line of questioning, the State intended to demonstrate the reason behind Sok's new and more favorable plea agreement.

***10** The State explained to the trial judge that Sok backed out of his original plea agreement after his brother had been shot at by someone other than Chea and Phet. The trial court ruled that, by inquiring into Sok's reasons for backing out of his plea agreement, Chea's counsel had opened the door in this area of inquiry. The court also gave a limiting instruction:

> You will hear testimony regarding Veasna Sok's brother being shot at in the year 2000. Before this evidence is allowed, the court advises you that you may consider the evidence only for the limited purpose of showing Veasna Sok's state of mind when he decided to withdraw his plea agreement with the Pierce County Prosecutor's Office in 2000.
>
> Neither defendant in this case has been charged or implicated in that shooting. You must not consider the evidence for any other purpose.

RP at 4455. The trial court acted within its discretion in allowing the State to explore why the State offered Sok a new deal.

F. Chea's and Phet's Custodial Status

Chea and Phet further contend that the prosecutor improperly elicited testimony from several officers about Chea's and Phet's custodial status. Specifically, several officers testified that they worked in the jail and escorted Chea and Phet to and from the courtroom. Also, an officer testified that he was responsible for transporting people to and from jail and he referred to Chea and Phet as 'inmates.' RP at 3851.

The fundamental right to a fair trial is secured by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV, and Wash. Const. art. I, sec. 22. Central to the right to a fair trial is the principle that a defendant is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, not official suspicion, indictment, continued custody, or other circumstances short of proof. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

In light of the fundamental right to the presumption of innocence, courtroom security measures such as shackling, gagging, or handcuffing can unnecessarily mark the defendant as guilty or dangerous. *Holbrook*, 475 U.S. at 567–68. But unlike physical restraints, uniformed security guards in a courtroom do not inherently prejudice a defendant's right to a fair trial. *Holbrook*, 475 U.S. at 569.

Here, the State called the corrections officers to testify about Chea's and Phet's assault on Sok. Before the officers described the assault they had witnessed, the State inquired as to their occupation, place of employment, and their relationship with Chea and Phet.

Chea and Phet concede that the jurors were likely aware that both of them were in custody. Moreover, they did not

seek a limiting instruction. The officers' testimony regarding their place of employment and their role in escorting Chea and Phet to and from jail were not unfairly prejudicial to Chea and Phet. The trial court did not err in allowing this line of questioning.

G. Right to Remain Silent

***11** Chea contends that Davidson impermissibly commented on Chea's exercise of his right to remain silent.

The Fifth Amendment to the United States Constitution states, in part, that no person 'shall ... be compelled in any criminal case to be a witness against himself.' Washington Constitution article I, section 9 states in part: 'No person shall be compelled in any criminal case to give evidence against himself.' The State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence for the jury to infer guilt from such silence. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). '{ A} mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice' that is an error that actually affects the defendant's rights. *State v. Lewis*, 130 Wn.2d 700, 706–07, 927 P.2d 235 (1996).

Here, during direct examination, the prosecutor asked Davidson to relate the events and content of his interview with Chea. The following exchange occurred:

> { Detective:} { I} { s} howed him one of the surveillance photos with his vehicle clearly in the picture.
>
> { Prosecutor} : Did he respond to that?
>
> { Detective} : Yes, he did.
>
> { Prosecutor} : What did he say?
>
> { Detective} : He said, 'I'm not the only one that drives that car.'
>
> { Prosecutor} : Did he say anything further in the interview?
>
> { Detective} : No, he didn't. He clammed up. He never said another word.

RP at 3471.

The record reflects that the State inquired no further about Chea's silence. Nor did it refer to the comment during further testimony or in closing argument. Even assuming error, it is harmless as it did not materially affect Chea's rights, given the otherwise overwhelming evidence against him.

H. Opinion of Guilt

Chea and Phet further contend that Davidson impermissibly commented on their guilt. They assert that his statement, that in the course of his investigation he arrested and booked them into jail, implied guilt. We disagree. Although a witness may not comment on another's guilt,[37] Davidson did not do so here. Rather, he testified about his actions as lead detective and based on his personal knowledge.

IV. Jury Instructions

A. Essential Elements of the Crime

Chea and Phet further contend that the jury instructions relieved the State of its burden to prove all of the essential elements of the crime. They assert that the State failed to identify the intended victim of the charged premeditated murder. The court instructed the jury: 'A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or an accomplice causes the death of such person or of a third person.' CP (Phet) at 1379.

This argument repeats Chea's and Phet's earlier essential element argument that the intended victim must be named in the charging document. As already noted, we disagree.[38] This argument likewise fails.

B. Major Participant in the Crime

***12** Citing *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), Chea and Phet also argue that the jury instructions and special verdict forms were deficient because they did not require the jury to find that they were major participants in the crimes. In Roberts, our Supreme Court held that major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder. Merely satisfying the minimal requirements of the accomplice liability statute is insufficient to impose the death penalty under RCW 10.95.020, the Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State Constitution. 142 Wn.2d at 505–06.

Here, the State did not seek the death penalty against

Chea and Phet; thus, Roberts does not apply. Also, Chea and Phet contend that the aggravating factors of the crimes must apply personally to each of them and that the jury instructions and the verdict forms failed to instruct the jury accordingly. We disagree.

To convict a person of aggravated first degree murder, the State must prove all elements of first degree murder and that there was more than one victim and the murders were a part of a common scheme or plan. In other words, to find an aggravating factor, it is not necessary that a particular defendant commit more than one murder; it is sufficient that his or her accomplices murder more than one person as a part of a plan. Thus, Chea's and Phet's argument fails.

C. Aggravating Factors Applying Specifically to Chea

Chea further argues that when the jury was asked to decide whether '{ t} here was more than one person murdered[39] and the murders were part of a common scheme or plan or the result of a single act of the person,' CP (Chea) at 867, it allowed the jury to find the aggravating factor applicable to him based on an accomplice's acts. He cites *In re the Personal Restraint Petition of Howerton,* 109 Wn.App. 494, 36 P.3d 565 (2001) in support.

In Howerton, Division One held that 'a defendant's culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature's intent to create strict liability. Instead, any such sentence enhancement must depend on the defendant's own misconduct.' 109 Wn.App. at 501.

The instruction here comports with Howerton. It focuses on a specific act (i.e., murder of more than one person and a common scheme or plan). Thus, to determine whether this aggravating factor was properly applied to Chea, the key inquiry is whether the evidence sufficiently implicated him in the murders that were part of a common scheme or plan.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the prosecution, it permits any rational fact finder to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.' *Salinas,* 119 Wn.2d at 201. We leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

***13** Before the shooting, Chea wore red clothes. He asked other assailants whether they wanted to 'put in work' that night—the phrase that the testifying witnesses understood to mean to shoot Kim. Chea also talked to Le about Kim 'mean mugging' him. Before driving to the cafè, Chea stopped at a payphone and told Chak to call to ascertain whether Kim remained there. And after learning that Kim was at the cafè, Chea went there. Finally, the guns were stored in Chea's car. This evidence sufficiently established Chea's culpability in the murder of multiple persons as part of a common scheme or plan.[40]

V. Insufficiency of the Evidence

Chea also contends that insufficient evidence supported finding that he had a premeditated intent to murder specific named persons. This assertion flows from Chea's arguments that the charging document was defective and the jury instructions incorrect because they failed to name specific individuals. Because we hold that the State need not identify the victim of the premeditated murder, Chea's argument fails.

VI. Cumulative Error

Chea and Phet contend that the doctrine of cumulative error compels reversal and a new trial because the trial errors had a serious impact on their ability to receive a fair trial.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re the Personal Restraint Petition of Lord,* 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Because we find no error, this argument fails.

VII. Statement of Additional Grounds

Phet raises additional arguments in his Statement of Additional Grounds (RAP 10.10), none of which has merit.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: MORGAN, P.J., and HUNT, J.

All Citations

Footnotes

1 Four judges presided over this case. First, Judge Grant Anderson entered CrR 3.5 findings of fact and conclusions of law. When our Supreme Court removed Judge Anderson from the bench, for reasons unrelated to this matter, Judge Rudy Tollefson made preliminary rulings. When the Supreme Court suspended Judge Tollefson from the bench, for reasons unrelated to this matter, the case was re-assigned to Judge Vicki Hogan. Judge Hogan made preliminary rulings, but then recused herself on the defendants' request. Judge Karen Strombom then presided over all further matters, including the trial.

2 We derive the facts from pretrial proceedings and trial testimony.

3 The verbatim reports of proceedings are not numbered consecutively. Therefore, the standard abbreviation, 'RP' followed by a page number, represents only the trial records before Judge Strombom. The trial record is the most extensive and it is consecutively numbered. 'RP' followed by a date and a page number identifies all other proceedings before various judges.

4 These casings came from five different guns: a 7.62 rifle, three different 9 millimeter semiautomatic handguns, and a .380 semiautomatic handgun.

5 During the searches, the detectives found several photographs of gang members. The trial judge later stated:
> I believe some photos are admissible to show the relationship that all of the gang members had with each other, and I think it's particularly significant that these photos were found at the various homes in which the search warrants were executed, in particular Ri Le's and Khanh Trinh's home as well, because that's part of the theory of the case as to why other members of the gang would do what Ri Le wanted them to do. Report of Proceedings (RP) at 2317.

The court admitted into evidence four photographs of gang members, including the one showing gang members holding guns.

6 In November 2000, Chea and Phet moved to suppress evidence obtained in executing these search warrants, arguing lack of probable cause. In March 2001, Judge Hogan denied the motion. She found compelling ballistics comparisons between casings recovered at the Trang Dai Cafè crime scene and shell casings recovered at a prior shooting scene where the assailants' and the car's descriptions matched those from the cafè shooting. Additionally, Judge Hogan considered prior police contacts with Chea and Phet and their residences or vehicles, and the security videotape from behind the Trang Dai Cafè. From these facts, Judge Hogan found a nexus between the places to be searched and the criminal activity prompting the search.

7 Sok and Leo stated that Phet rode in the car driven by Chea. During the shooting, Phet was stationed at the rear entrance of the cafè while armed with a 9 millimeter handgun. These co-defendants also claimed that they observed Phet discharging the firearm. Ngeth stated that he did not actually observe Phet discharge a firearm, but that Phet exited the vehicle driven by Chea and headed toward the cafè while armed. Sok and Ngeth claimed that they remained inside the parked vehicles in the alley behind the cafè and that they did not participate in the shooting.

8 *Miranda v. Arizona,* 384 U.S. 436, 483–85, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

9 Phet later moved to suppress his statements, arguing they were involuntary because he had limited education and understanding. Reasoning that Phet made his statements freely and voluntarily after he had been properly advised of his constitutional rights and having chosen to waive them, Judge Anderson declined to suppress the statements. Judge Anderson also stated that '{ t} he delay between the time of the defendant's arrest and the time he was interviewed and advised of his rights is understandable given the need for the same detectives to do all of the suspect interviews, and was not prejudicial to the defendant.' Clerk's Papers (CP) Phet 165–66.

10 The State also charged several other defendants not subject to this appeal: Ri Le, Samath Mom, Khanh Trinh, Sarun Ngeth, Marvin Leo, Veasna Sok, and John Chak. Samath Mom, defendant Phet's brother, committed suicide. Le shot his brother Khanh Trinh and then killed himself when authorities sought to arrest them. Marvin Leo pleaded guilty as

charged. Veasna Sok, Sarun Ngeth, and John Chak entered into plea agreements with the State.

11 Later, when Judge Strombom took over the case, the defense argued that the trial court must hold a preponderance hearing regarding gang planning. Judge Strombom declined to do so.

12 On that day, officers transported Phet, Chea, and Sok to court for a hearing. Once the officers removed Phet's and Chea's handcuffs, they began hitting Sok, who was still handcuffed. The officers heard Chea and Phet call Sok a 'snitch' and yell, 'snitches die.' RP (03/24/00) at 38.

13 Judge Tollefson noted: 'This evidence and the statements that were made not only shows consciousness of guilt, but it also links the parties to the crime itself. For that reason, its probative value certainly outweighs the prejudicial effect because it directly links the parties to the crime.' RP (03/24/00) at 39.

14 On September 5, 2001, Judge Hogan denied Chea and Phet's motion to reconsider Judge Tollefson's earlier ruling on this issue. Judge Hogan stated that she did not find the connection between the shooting and the guns and unlawful gambling, or narcotics activities at the cafè. When Judge Hogan recused herself from the case, Judge Strombom also denied the renewed motion to admit evidence of unlawful activities at the cafè. Judge Strombom found no evidence establishing a nexus between these acts and the crimes at issue.

15 Later, Davidson testified that, in gang culture, the term 'mean mugging' is a 'hard stare' meant to challenge or intimidate. RP at 3487. Davidson opined that 'mean mugging' could be a prelude to violence and such violence 'doesn't have to be immediate.' RP at 3488.

16 Davidson stated that the founding members of a gang were called 'OG's,' or 'original gangsters.' RP at 3405.

17 Davidson testified that the 'Crips' adopted blue as their color and the 'Bloods,' a rival gang, adopted red. RP at 3406. Davidson opined that a Crip, such as one of the LOC's, would not dress in red and go out with other Crips unless intending to commit a crime in an attempt to frame a rival gang.

18 See footnote 5.

19 CrR 3.1 states:

> (b)(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.
> ....
> (c)(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

20 A defendant's rights under CrR 3.1 are procedural, not constitutional. An alleged statutory error, such as this one, is harmless, unless, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' *State v. Hancock,* 46 Wn.App. 672, 678, 731 P.2d 1133 (1987) (citation omitted), *aff'd,* 109 Wn.2d 760 (1988).

21 Moreover, Chea and Phet gave alibi statements or did not acknowledge any involvement in the shootings.

22 Judge Hogan noted:

> { I} t's clear Judge Tollefson did leave the door open, and didn't feel that in February of 2000 ... the State had satisfied what he thought was th proper inquiry.
> I will require an offer of proof, but I am not closing the door on this issue. I think under Evidence Rule 404(b) the gang involvement does go to the theory of the State's case. The absence of mistake or accident, the evidence of premeditation or with a plan of preparation, as well as intent which are relevant to prove an essential ingredient of the crime charged.... It is probative evidence of interrelationships of the participants. There was bad blood between Ri Le and Son Kim. Whatever that basis was, ... that is not the motive to improve an individual status within the gang, the gang's benefit, but the gang ... adopted Ri Le's crime, and the gang affiliation is relevant to the relationship of the participants....
> I feel that the evidence of the gang involvement and how a gang operates is critical to the showing of how each participant in the gang acted.
> RP (5–24–01) at 612–13.

23 Defense counsel raised a question about Davidson's qualifications earlier in the proceedings and questioned whether he had attended lengthy classes. Counsel did not repeat the objection later when Davidson testified and, although we could decline to review it, we review it in the interests of justice.

24 ER 702 allows an expert to testify if 'specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' An expert testifying as to gang culture need not acquire his knowledge through personal gang membership experience. ER 702.

25 Judge Strombom allowed Davidson to testify as to the gang culture and rules. Judge Strombom noted that Davidson's testimony explains to the jury various aspects of a gang and the relationships that develop within a gang. This is not common knowledge, but rather is knowledge gained through experience. Further, the testimony is not based on Detective Davidson's personal observations of any individual defendant, but rather is used to explain a world which is not understood by people who have no gang experience. For these reasons, I believe that the testimony is relevant as to motive, intent, identity, plan, preparation and knowledge. I do not believe that the purpose for which the testimony is being presented is unduly prejudicial, as it provides an explanation to the jury regarding gangs and gang life. RP at 2212–13.

26 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' ER 404(b). In applying ER 404(b), a trial court must engage in a three-step analysis: (1) determine the purpose for which the evidence is offered, (2) determine the relevance of the evidence, and (3) balance on the record the probative value of the evidence against its prejudicial effect. *State v. Campbell.* 78 Wn.App. 813, 821, 901 P.2d 1050, *review denied,* 128 Wn.2d 1004 (1995).

27 Chea and Phet also argue that the gang testimony infringed on their First Amendment right of association. Gang membership is not admissible to prove abstract beliefs and associations in part because it is protected by the constitutional rights of freedom of speech and freedom of association. *Dawson v. Delaware.* 503 U.S. 159, 165, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). But association evidence is inadmissible only when it proves nothing more than a defendant's abstract beliefs. *Dawson.* 503 U.S. at 164–67. The constitutional right to free association does not bar the admission of associational evidence when such evidence is relevant to a material issue at trial. *Campbell.* 78 Wn.App. at 822; *United States v. Robinson.* 978 F.2d 1554, 1565 (10th Cir.1992), *cert. denied,* 507 U.S. 1034 (1993). As we discuss below, evidence of Chea's and Phet's gang affiliation was relevant to show premeditation and motive. Thus, its admission did not violate their First Amendment rights.

28 In Campbell, the State charged a gang member with killing two rival gang members. The State theorized that the defendant had been motivated to kill the victims because they invaded his 'turf' and challenged his authority. It properly showed that the defendant was a gang member; that the victims were rival members who 'disrespected' the defendant and sold drugs on his 'turf'; and that, in gang culture, these resulted in violent retaliation. *Campbell.* 78 Wn.App. at 822.

29 The Abel court allowed the State to show that a defense witness and the defendant belonged to the same gang, that each member of the gang took an oath to lie on behalf of other members; and, thus, that the defense witness was arguably biased. 469 U.S. at 47.

30 In Boot, the gang evidence showed motive and premeditation where killing someone enhanced a gang member's status. *Boot.* 89 Wn.App. at 789–90. The appellate court affirmed. *Boot.* 89 Wn.App. at 794.

31 This conclusion disposes of Chea's and Phet's argument that there was an 'insufficient nexus' between the offered evidence of gang activity and the shooting at the cafè. Under ER 401 and 403, the required nexus is that the evidence has a 'tendency' to prove or disprove a fact of consequence to the action and that the evidence have probative value that was not substantially outweighed by unfair prejudice. That nexus existed here. Chea and Phet also argue that the gang evidence was mere profile testimony and that the prejudicial effect of admitting the gang members' photos outweighed their probative value. We disagree. After carefully evaluating and weighing the evidence, the trial court admitted these photographs to show the relationship of the gang members. The trial court did not abuse its discretion.

32 Three judges considered this argument below. First, Judge Tollefson granted the State's motion to exclude evidence of unlawful activity at the cafè on the grounds that the evidence was irrelevant or based on hearsay, but he allowed Chea and Phet to ask for review of that ruling if they could present a better offer of proof. Second, Judge Hogan denied Chea and Phet's motion for reconsideration of Judge Tollefson's ruling. Judge Hogan ruled that she found no automatic connection of the crimes at issue with the unlawful activities at the cafè. Judge Hogan also found that the facts that Chea and Phet wanted to admit were 'remote speculations.' RP (08/23/01) at 57. Finally, Chea and Phet moved for

reconsideration before Judge Strombom, who denied their motion.

33 Without properly citing authority or setting forth argument, Chea and Phet also argue that the trial court improperly excluded a photograph of another car taken from the surveillance tape, a letter from Chak to Chea, and evidence that Chea's brother had been threatened. We decline to further address this contention. RAP 10.3(a)(5); *State v. Jacobs*, 121 Wn.App. 669, 681 n. 2, 89 P.3d 232, *review granted on other grounds,* 152 Wn.2d 1036 (2004).

34 Although evidence tending to show that another party may have committed the crime may be admissible, before it can be admitted, there must be such proof of connection with it, such facts or circumstances tending clearly to point out someone other than the one charged as the guilty party. *State v. Kwan*, 174 Wash. 528, 532–33, 25 P.2d 104 (1933). 'Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.' *Kwan*, 174 Wash. at 533 (citing *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932)). 'Mere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.' *Kwan*, 174 Wash. at 533 (citing *People v. Mendez*, 193 Cal. 39, 223 P.65 (1924)).

35 The trial court ruled that the State could ask about the State's thought processes in offering a new deal, but not as to Sok's reasons for taking it because he would have to testify as to his reasons.

36 The relevant dialog follows:

Q: Veasna was offered his new deal back in February?
A: Yes.
Q: Based on what?
A: You'll have to ask the prosecutors.
Q: There were no new developments between his first deal and February of 2001 which would generate a new plea offer?
A: There were developments, but not in reference—
....
A. —to the other suspect.
RP at 3610.

37 *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (allowing a witness to opine to the guilt of the defendant invades the exclusive province of the jury).

38 See preceding section I, Charging Document.

39 No one disputes that more than one person was murdered.

40 We decline the State's invitation to revisit Howerton because the facts here fit within it.

Exhibit 4

NO. 48877-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, JOHN PHET, Appellant.	DECLARATION OF KECIA L. RONGEN

I, KECIA L. RONGEN, make the following declaration:

1. I am the Chair of the Indeterminate Sentence Review Board (ISRB) with the Department of Corrections in Lacey, Washington.

2. As the Chair of the ISRB, one of my job duties is to retrieve and/or maintain records kept by the ISRB in the ordinary course of business, including certified copies of an inmate's judgment and sentence as well as other related documents.

3. Upon request of the Attorney General's Office, I have provided true and correct copies of the following documents regarding John Phet, DOC #843064 to be used as exhibits:

Exhibit 1: Judgment and Sentence, *State v. Phet*, Pierce County Superior Court Cause No. 98-1-03162-1, filed June 28, 2002.

Exhibit 2: Judgment and Sentence Addendum Setting Minimum Terms, *State v. Phet*, Pierce County Superior Court Cause No. 98-1-03162-1, filed March 25, 2016

Exhibit 4

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 21 day of April, 2017, in Lacey, Washington.

KECIA L. RONGEN
Chair, ISRB

WASHINGTON STATE ATTORNEY GENERAL
April 21, 2017 - 3:24 PM
Transmittal Letter

Document Uploaded: 6-prp2-488779-Response.pdf

Case Name: State v. Phet

Court of Appeals Case Number: 48877-9

Is this a Personal Restraint Petition? ■ Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

Brief: ___

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Katrina Toal - Email: katrinat@atg.wa.gov